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No. 92-709

In The

Supreme Court of the United States

OCTOBER TERM 1992

ASSOCIATED BUILDERS AND CONTRACTORS, INC.; ASSOCIATED GENERAL CONTRACTORS OF ALASKA; IRBY CONSTRUCTION CO.; IRBY/ALASKA UTILITIES CONSTRUCTION CO.

Petitioners,

vs.

CITY OF SEWARD, an Alaska own rule municipality; INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 1547, a labor union,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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Petitioners Associated Builders and Contractors, Inc., Associated General Contractors of Alaska, Irby Construction Company and Irby/Alaska Utilities Construction Company, hereby reply to the Respondents' Brief in Opposition to the petition for writ of certiorari.

1. At the outset, the Respondents have conceded that the present petition should be held in abeyance pending the disposition of the *Boston Harbor* case, "under the Court's settled practice." Resp. Opp. at 2. Petitioners agree that this is a logical approach. *See* Pet. at 20.

The Respondents nevertheless have erroneously attempted to distinguish the *Boston Harbor* decision from the present case. Respondents' claim rests entirely on the Ninth Circuit's incorrect conclusion that the City of Seward, unlike the MWRA, should be exempt from labor law preemption because the City was acting out of its "concerns" as a public employer. Pet. App. A11. The court reasoned that the union signatory requirement in this case was imposed pursuant to a "work preservation clause" already existing between the City and the union representing its own electrical employees. *Id.* at A12.

As Petitioners have previously noted, however, the distinction cited by the Respondents and the Ninth Circuit is meaningless. In the present case, as in *Boston Harbor*, no city employees were ever hired to work on the Project. Indeed, it is undisputed that the City did not have the heavy equipment necessary to perform the particular transmission line repair work at issue, which is why it was compelled to subcontract out the work to the private sector. Pet. App. A12 n.4. The fact that the City has a collective bargaining agreement with its own employees is thus entirely irrelevant and provides no basis whatsoever for a local government to interfere with the collective bargaining rights of *private* employers.

Moreover, because the City was clearly not an "employer" in this context, it may not rely on the state employer exemption found in § 2(2) of the NLRA. Rather, just as the MWRA in *Boston Harbor*, the City was acting as a third party purchaser of construction services. As the First Circuit observed, if this Court were to interpret the NLRA to allow governmental bodies to impose such restrictions on all companies from which they purchase goods and services, it would "effectively permit [them] to regulate labor relations between private employers and their employees thus totally displacing the NLRA . . ." *ABC v. MWRA*, 935 F.2d 345, 355 (1st Cir. 1991).

2. In the petition for certiorari, the Petitioners further argued that, contrary to the Ninth Circuit's opinion, the relevant portion of the collective bargaining agreement in this case would not have been a valid "work preservation clause" even if it had been entered into between a private employer and a union. Both the courts and the NLRB have clearly held that a valid work preservation clause applies only to work traditionally performed by bargaining unit employees. *See, e.g., National Woodwork Manufacturers Assoc. v. NLRB*, 386 U.S. 612 (1967); *Associated General Contractors of Calif., Inc. v. NLRB*, 514 F.2d 433 (9th Cir. 1975). Because the City's employees have *never* performed the work at issue in this case, the union signatory requirement could not, by definition, constitute a valid work preservation clause.

The Respondents' contention that this argument was not made below is disingenuous. The characterization of the agreement as a work preservation clause originated with the panel majority at oral argument and was not presented in briefs from either side or in the opinion of the district court. To be sure, both the district court and the Respondents did argue that the City should be entitled to rely on its preexisting agreement with the union, but neither attempted to characterize it as a "work preservation clause," a term of art under the NLRA. Their failure to do so was understandable since both the district court and the Respondents recognized that the NLRA's terms did not apply to agreements negotiated between the City and its public employees.

The Ninth Circuit incorrectly asserted that the Petitioners did not dispute that the clause pursuant to which the City acted would have been valid if entered into by a private employer. Pet. App. A10 n.2. The Petitioners' sole concession related to a separate issue, whether a private construction industry employer could reach such an agreement under the "construction industry" exemption to Section 8(e) of the Act, which did

not apply to the City in any event. The Petitioners did not concede that the clause in question was an otherwise valid work preservation clause, a notion raised by the panel *sua sponte* at oral argument.

CONCLUSION

For the foregoing reasons, as well as the reasons set forth in the petition, the Court should grant the petition for writ of certiorari or hold it in abeyance pending the outcome of the *Boston Harbor* case.

Respectfully submitted,

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